DIGEST OF BUSINESS REVIEWS

1997

97-1 DataCheck, Inc. 1/6/97

Price Auditing Services Information Exchange

Facts: Datacheck, a Georgia company that has provided price auditing information to a grocery chain retailer, proposed to expand its business to provide current retail shelf price information to interested buyers. Potential customers already have access to this information through advertisements and manual price audits. Datacheck will not provide any information as to future pricing intentions of retailers. Additionally, Datacheck is not owned or controlled by any retailer that will participate in the price information program, nor will it have any financial interest in any participating retailer.

Response: The proposed pricing information service could be anticompetitive were it to be employed by competing firms as a device to monitor compliance with a price-fixing agreement. Such a risk is attenuated, however, in a market where price information is already public and is not subject to negotiation, as would be the case with the price information of retail grocers and mass merchandisers that Datacheck intends to purchase and provide. The plan could be procompetitive to the extent that it offers retailers a more efficient method of obtaining public information. The Department has no present intention to challenge the proposal.

97-2 Attorney Group 1/17/97

Legal Services Horizontal Agreement (Misc.)

Facts: Seventeen attorneys, representing sixteen firms in thirteen different cities, proposed to form a group to provide legal services to clients in the construction industry. The attorneys will work on a flat fee basis, and where different construction industry clients are each represented by members of the group the fee will be refunded in full if, at either client's discretion, litigation or arbitration is required to resolve a dispute. Attorneys in the group will negotiate fees with clients individually, and will remain free to withdraw from the group whenever they choose and to pursue individual fee arrangements while remaining a member of the group.

Response: The proposal does not include any agreement on fee arrangements by participating attorneys, and allows the attorneys to retain the rights to negotiate their own fees and withdraw from the group at any time. Additionally, a group of seventeen attorneys is unlikely to raise prices or reduce output or diversity, given that there are thousands of providers of legal services to construction industry clients. The arrangement could prove procompetitive to the extent that it reduces legal costs for the industry. The Department has no present intention to challenge the proposal.

97-3 Marin General Hospital/ Ross Hospital — 2/11/97

Health Care
Hospital Services — Joint Venture

Facts: Two Marin County, California hospitals proposed to consolidate their inpatient mental health services. While the two hospitals compete in providing inpatient and other psychiatric care to adults, Marin General does not provide the chemical dependency programs and the inpatient psychiatric services for children and adolescents that Ross provides. The hospitals will continue to compete in the sale of the consolidated services and will not jointly determine prices for the consolidated services, other than for Medicaid and indigent patients covered under the county's program. Joint pricing for Medicaid and county program patients will not eliminate competition, however, since the hospitals do not compete for that business.

Response: The proposed consolidation will not result in per se illegal conduct, and under a rule-of-reason analysis the Department is not prepared to say that the consolidation is likely to have a net anticompetitive effect. While these are the only hospitals in Marin County providing inpatient psychiatric care, the venture explicitly preserves the potential for price competition between the hospitals and includes protections against the unnecessary sharing of confidential business information. Although the venture has the potential for reducing competition in quality of care or other nonprice areas, and joint pricing for Medicaid patients could facilitate collusion on the pricing for other patients, the venture also may lower the cost of adult mental health services by eliminating duplicative costs and spreading fixed costs over a larger population. The consolidation may thus permit the hospitals to offer competitive rates for the care of Medicaid patients and indigent patients covered by a Marin County program. On balance, the Department has no present intention to challenge the proposal.

97-4 Santa Fe Managed Care Organization 2/12/97

Health Care — Joint Venture
Medical Services — Physician Network Joint Venture

Facts: Sole general acute care hospital and 70-75 physicians in Santa Fe proposed to form a non-profit managed care organization to negotiate primarily risk-based contracts with payers. By subcontracting, the organization's physician panel could include virtually all remaining Santa Fe physicians. All physicians would provide services on a non-exclusive basis. For contracts not involving substantial risk sharing among SFMCO's members, SFMCO will act as a "messenger" to facilitate contracting between third-party payers and SFMCO's individual member and non-member participating physicians. While SFMCO members will be liable for a share of SFMCO's deficits and eligible for a share of SFMCO's surplus, non-member (subcontracting) physicians will not. SFMCO will also implement other requirements designed to create divergence of economic interest between member and non-member physicians, giving members incentives to bargain down the compensation paid to non-member physicians. With three exceptions, SFMCO's member physicians together with any physician employees of the hospital will not exceed 30 percent of the physicians with offices in the City of Santa Fe in any physician specialty. The exceptions are for (1) physician specialities in which all the SFMCO member physicians in the specialty are in a preexisting integrated practice group that has not been formed or expanded to avoid the 30 percent limitation, (2) family practitioners and internists who are represented to be good substitutes for each other in the Santa Fe area, and (3) pediatricians.

Response: Although SFMCO's proposal creates the potential for anticompetitive conduct that could cause harmful effects on consumers, it also has the potential for creating significant efficiencies by offering payers capitation and global fee arrangements that are not now generally available in the Santa Fe area. The Department has no present intention to challenge the proposal.

97-5 CVT Surgical Center/ Vascular Surgical Associates of Baton Rouge — 4/16/97

Health Care Medical Services — Acquisition/Merger

Facts: Group of six cardiovascular-thoracic surgeons proposed to merge with group of four peripheral vascular surgeons. The groups were more complementary than competitive, with only 60 procedures performed in common by the two groups -- about 15 percent of the procedures performed by CVT were peripheral procedures also performed by VSA. The groups contended that their geographic market was at least as large as an area within one and one-half hours' drive from Baton Rouge, Louisiana, including the cities of Hammond, New Orleans, Houma, Lafayette and Thibodaux. In that area the merged entity would represent significantly less than 20 percent of the surgeons available to perform the relevant procedures. Alternatively, the merging groups accounted for approximately 50 percent of the vascular surgeons listed in the Baton Rouge Yellow Pages.

Response: While the Department doubted that the geographic market was as large as the parties proposed, the payers in the greater Baton Rouge area (a more probable geographic market) needed very few peripheral vascular surgeons to successfully market their plans to consumers. Competing surgeons from the New Orleans area seemed capable of quickly entering the Baton Rouge market, and had in fact begun to do so. Payers in the area were generally confident that the merged group was not likely to acquire market power. The Department concluded that the proposed merger was not likely to have any significant adverse competitive effects and might result in efficiencies benefitting consumers and payers. The Department has no present intention to challenge the proposal.

97-6	Orthopaedic Associates of Mobile, P.A./ The Bone & Joint Center of Mobile	4/16/97
	Health Care Medical Services	Acquisition/Merger

Facts: Two groups of orthopedic specialists in the greater Mobile, Alabama, area proposed to merge. The combined entity would be an integrated group practice comprised of 16 of the 50 providers of orthopedic services (32 percent) in the greater Mobile area.

Response: Such a combination could raise competitive concerns, but no managed care plan or other third-party payer expressed any concern that the proposed merger would likely cause any substantial anticompetitive effects. Rather, payers were confident that if the merged group attempted to raise prices, they would have adequate substitutes to defeat such a strategy. The Department has no present intention to challenge the proposal.

97-7	Petroleum E&P Research Cooperative	4/23/97
	Petroleum	Joint Research Project Joint Venture

Facts: Six major oil companies and Texas A&M University proposed to form a joint research and development venture to perform exploration and production research not attractive for individual firm research. The Cooperative will comply with the requirements of the National Cooperative Research and Production Act, including notifying the DOJ and FTC of its plans both for the joint venture's membership and proposed activities, and for individual research projects. Each firm will remain free to conduct research outside the cooperative, and it is projected that a majority of the firms' contributions to the cooperative will not exceed ten percent of their individual R&D budgets. Each member that contributes to the support of a particular project will have the right to a perpetual, nonexclusive royalty-free worldwide license to any project technology resulting from that project, as well as the right to sublicense such technology to a non-member.

Response: The Cooperative Agreement includes no provisions that appear likely to affect price, output, or research competition in the petroleum industry. Member firms will continue to conduct independent research, and the Cooperative will constitute only a small portion of the total exploration and production research in the industry. The intellectual property provisions of the Cooperative do not appear structured so as to discourage innovation. The Department has no present intention to challenge the proposal.

97-8 Whiting Conservation Cooperative 5/20/97

Fishing Fish Processing

Facts: Four fish catchers and processors proposed to form a cooperative to allocate amongst themselves a portion of the fixed quota of Pacific Whiting that the Department of Commerce allows to be harvested from U.S. Pacific waters in a given year. Presently, the members compete in an "olympic" system whereby each firm attempts to maximize its harvest by catching as many fish as fast as it can. The processors argue that such a system encourages over-investment in harvesting and processing capacity as well as needless harvesting of ecologically-sensitive non-target species. The agreement expressly forbids participating firms from collaborating on purchasing, processing, marketing, or sales plans. The members also agree to contribute funds for research and publication designed to increase the yield of processing and reduce incidental by-catch of non-target species.

Response: The Department of Justice has previously stated that the employment of an "olympic" system to harvest a fixed quota of fish is inefficient because it tends to encourage over-investment in fishing and processing capacity. The agreement does not restrict output of processed Pacific Whiting or the primary end product which incorporates it, surimi. Elimination of the race to gather an input whose output is fixed by regulation appears unlikely to reduce output or to raise prices. The Department has no present intention to challenge the proposal.

97-9 Russell-Stanley Corporation 5/20/97

Steel Drums Group Purchasing/Sales

Facts: Russell-Stanley proposed to organize joint sales ventures to respond to requests by large customers for single source bids on steel drum contracts. R-S will act as the prime contractor and solicit bids from subcontracting firms that produce drums in regions where R-S does not. R-S will not solicit bids from firms with whom it competes in the sale of steel drums. The only price information to be exchanged would be the price quoted by the subcontractor to R-S for use by the latter in formulating its national bid.

Response: Given that R-S will not use subcontractors with whom it competes and that it pledges to limit the exchange of price information to price quotes from subcontractors necessary for the compilation of a national bid, this proposal does not appear likely to restrain competition in the steel drum industry. The proposal could prove procompetitive to the extent that it allows R-S more effectively to compete with other large steel drum manufacturers. The Department has no present intention to challenge the proposal.

97-10 Southwest Orthopedic Specialists 6/10/97

Health Care
Medical Services

Joint Venture
Physician Network Joint Venture

Facts: Ten of approximately 62 orthopedic specialists in the Albuquerque metropolitan area proposed to form a non-exclusive risk-bearing joint venture to jointly market their services to third party insurers covering a statewide population. Risk would be shared either by accepting capitated rates, or by offering services under a discounted fee-for-service schedule with a 15 percent withhold that would be forfeited unless SOS as a whole meets certain efficiency and quality parameters. While the network intends to expand in the future to meet insurers' coverage needs, at no time would it exceed 30 percent of the orthopedic specialists in any relevant geographic market.

Response: Absent extraordinary circumstances, the Department will not challenge a non-exclusive physician network joint venture whose participants share substantial financial risk and constitute 30 percent or fewer of the physicians in a practice specialty in a relevant market. SOS meets these criteria. The Department therefore has no present intention to challenge the proposal.

97-11 Gastroenterology Associates, Ltd./ 7/7/97
GI Associates, P.C./
Valley Gastroenterologists

Health Care Acquisition/Merger
Medical Services

Facts: Three practice groups each comprised of four gastroenterologists proposed to merge into a single 12-person firm in Allentown, Pennsylvania. The group would then represent 12 of 14 gastroenterologists in Allentown (85.7 percent) and 12 of 19 gastroenterologists in Allentown and nearby Bethlehem (63 percent). The group suggested that the geographic market area within which to measure the potential market power of the merged firm would be the Greater Lehigh Valley, including Lehigh and Northampton counties and parts of Bucks, Berks, and Carbon counties, because some of the merging physicians regularly traveled to these areas to provide services at outlying hospitals. Within that area, the group would comprise 36 percent of all board-certified gastroenterologists.

Response: Managed care payers told the Department that they could not market a product that excluded gastroenterologists, and the Department concluded that the medical specialty of gastroenterology was the appropriate product or service market for analyzing the merger. The Department also found the relevant geographic market to be at most the cities of Allentown and Bethlehem, and possibly only the city of Allentown. Managed care payers told the Department that they could not ask enrollees to travel to distant counties or, in many instances, even from Allentown to Bethlehem, to obtain gastroenterologic services in order to defeat a price increase by the merging firms. Based on its investigation, the Department concluded there was a significant likelihood that the proposed merger is likely substantially to lessen competition in the market for gastroenterologic services in the Allentown/Bethlehem area. It was not apparent that entry within two years of additional gastroenterologists would occur to defeat a price increase, particularly as it appeared there was already an oversupply of gastroenterologists in the area. The parties demonstrated no merger-specific efficiencies to counteract the potential anticompetitive harm posed by this merger. As a result, the Department was unable to state that it would not take enforcement action against the merger were it consummated as described.

97-12 Post-Tensioning Institute 7/30/97

Construction Standards Program

Facts: PTI is a trade association of firms and individuals involved in the production of a specific type of prestressed concrete structures. PTI proposed to require both current and prospective members to comply with its currently voluntary Program for Plant Certification in order to maintain or achieve membership. The certification program is administered by PTI but executed by an independent agency. The goal of the certification program would be to improve the quality and reputation of the specific structures PTI members produce. Certification will remain available to nonmember firms. Additionally, PTI will not attempt to discriminate against nonmember or noncertified firms in the marketplace.

Response: As PTI will continue to certify nonmember firms, and since neither PTI membership nor plant certification appear necessary to compete in the market for prestressed concrete structures, the Program for Plant Certification does not appear likely to be anticompetitive. The program could prove procompetitive if it heightens safety and quality standards and increases the competitiveness of the market for concrete structures. The Department has no present intention to challenge the proposal.

97-13 Vermont Physicians Clinic 7/30/97

Health Care	Joint Venture
Medical Services	Physician Network Joint Venture

Facts: Approximately 40 physicians from various medical specialties in Rutland, Vermont proposed to have their jointly-owned corporation negotiate risk contracts collectively on their behalf with third-party payers. With three different types of exceptions, VPC's participating physicians will not exceed 30 percent of the physicians in any specialty. The exceptions are for (1) specialties in which all of VPC's physicians are in a pre-existing integrated group practice not formed or expanded to avoid the 30 percent limitation, (2) internal medicine practitioners, who were properly considered part of a larger market that includes family practitioners, and (3) three specialties, each of which represents a small percentage of the total number of VPC's physicians. Safeguards will be established to ensure that VPC's competing physicians do not learn of their competitors' fees and prices through its operations. VPC will provide utilization review, quality improvement services, and some administrative services. VPC's individual physicians and practice groups have no current intention of terminating their existing contracts with third-party payers, or refusing to negotiate individually with them in the future.

Response: VPC's physicians will share substantial financial risk by providing services on either a capitated or substantial (at least 20 percent) withhold-of-compensation basis. In addition, with exceptions deemed not likely to have any substantial adverse competitive effect, VPC will limit the number of its participating physicians to 30 percent of the physicians in each specialty. VPC's physicians will be free to contract with other managed care entities independently or through other provider networks. The proposed operations of VPC could produce significant efficiencies, and managed care plans and other third-party payers expressed no concern that VPC's proposed operations would likely cause any substantial anticompetitive effects. Many payers believed that VPC would bring much-needed competition to the managed care panel of physicians formed by the only hospital in the Rutland area. The Department has no present intention to challenge the proposal.

97-14 National Consumer Telecommunications Data Exchange, Inc. 9/3/97

Telecommunications Information Exchange

Facts: The members of NCTDE, nine telecommunications companies, proposed to exchange information about former customers of the member carriers whose accounts have been closed with undisputed unpaid balances. The information will be collected and disseminated by a third-party vendor; there will be no direct communication between members beyond the administration of NCTDE. The information exchanged will be limited to closed accounts and will not include credit terms or practices of members. Each member will continue independently to make decisions as to the service of individual consumers.

Response: NCTDE does not appear likely to have anticompetitive effects. The amount and type of information exchanged will be unlikely to facilitate concerted decisions with respect to price, credit terms, or other business practices. Members will not communicate directly, and will continue to make unilateral decisions with regard to the service of individual customers. Membership in NTCDE will be open to other telecommunications carriers. To the extent that the exchange reduces costs and increases output, NCTDE could have procompetitive effects. The Department has no present intention to challenge the proposal.

97-15 First Priority Health System 11/3/97

Health Care Joint Venture
Medical Services

Facts: First Priority Health ("FPH"), an HMO subsidiary of Blue Cross of Northeastern Pennsylvania, and NEPPO Ltd, a limited partnership of 166 specialist and primary care physicians ("PCPs") practicing primarily in Lackawanna County, Pennsylvania (Scranton) proposed to form FPHS, a risk-bearing 50/50 joint venture, to provide and manage medical services for FPH's HMO enrollees in Scranton and surrounding counties. The PCPs in NEPPO would agree not to provide gatekeeper services for any other gatekeeper-type managed care plan. They would be free to contract with non-gatekeeper plans. Neither the specialists in NEPPO, nor any non-NEPPO specialists or PCPs hired by FPHS would be restricted from contracting with other plans, and some NEPPO PCPs would be excused from the exclusivity requirement because of shortages of PCPs in the towns where they practice. Fees for FPHS would be set by a Reimbursement Committee made up of only payer representatives on the FPHS Board of Directors; thus, no providers would be involved in setting provider fees. In addition, highly regarded Community Medical Center ("CMC"), one of three hospitals in Scranton, would continue an agreement not to contract with any other gatekeeper-type HMO, and FPHS would agree to send all of its Lackawanna County area enrollees to CMC unless medical necessity dictated otherwise.

Response: While other area managed care plans and some area employers felt that the loss of 38 NEPPO PCPs (most of whom will have to withdraw from other plans) could cause competitive harm to rival plans, the Department concluded that roughly 70 percent of area PCPs would still be available to the rival plans, and that other area hospitals, IPAs and PHOs would provide adequate competition to the FPHS system. Although FPH currently controls 60 percent of the managed care lives in Lackawanna County, there are three other active gatekeeper-type plans currently operating there, and a fourth about to enter. At least two of these are strong national competitors that have formed relationships with the other two Scranton hospitals. NEPPO physicians will be at risk for any losses of FPHS through their ownership interest and capitation, and are thus motivated to effect cost-saving measures and other efficiencies. The Department has no present intention to challenge the proposal.

97-16	California Large Electric Power Purchasing Association	11/20/97
	Electrical Power Cement Steel	Group Purchasing

Facts: Eight cement manufacturers and three steel manufacturers in California proposed to form an association to purchase electric power following the deregulation of the state power industry on January 1, 1998. Members will remain free to purchase all or some of their electricity individually. An independent purchasing agent will gather information from each of the members and will negotiate on CLEPPA's behalf; the members will not communicate any information directly amongst themselves.

Response: Given that CLEPPA's purchases will account for less than one percent of all electric power consumed in California, the members do not appear likely to gain market power through the association. In addition, the electric power purchases of the members constituted less than five percent of their revenues, making it unlikely that the elimination of the purchasing rivalry will affect output price competition among the members. The independent purchasing agent should prevent any potentially anticompetitive information exchange. The Department has no present intention to challenge the proposal.